



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: RICHARD DOYLE
City Attorney

SUBJECT: Ordinance - Campaign
Contributions –
Employee Work on Political
Campaigns

DATE: March 13, 2008

RECOMMENDATION

Approval of an ordinance that amends Section 12.06.050 of Chapter 12.06 of Title 12 of the San Jose Municipal Code (Campaign Contribution Ordinance) to provide that compensation in any amount by an employer to an employee who spends any of his or her compensated time rendering services for political purposes is a contribution or an expenditure if service is rendered at the request or direction of the employer and amending Section 12.06.250 to provide that except to the extent that Chapter 12.06 limits contributions by business entities, the provisions of the Political Reform Act shall apply.

BACKGROUND

In 2005, the City Council reviewed a recommendation to amend the Municipal Code to provide that:

1. Employers who pay their employees to work on political campaigns are subject to the City's campaign contribution limits as if the payments were made directly to the campaign committee; and
2. Campaign committees who receive services from persons who are being paid while working on the campaign, must report those services as campaign contributions subject to the City's contribution limits.

The Council did not, at that time, approve an amendment to the Code which would require that all employee paid activities be reported as a contribution by the employer to the candidate in a municipal election.

On January 9, 2007, the City Council approved Reed Reform No. 19 which recommended plugging loopholes in the campaign financing ordinance that make it possible to contribute unlimited amounts of money in the form of paid campaign

workers. This recommendation was forwarded to the Elections Commission to review as part of an audit of the activities of campaign committees.

On January 9, 2008, the Elections Commission recommended that an ordinance be prepared for Council approval which would eliminate an exception under state law for certain amounts of employee paid time for political purposes at the request or direction of the employer.

This memorandum discusses legal issues raised by the recommendation approved by the Council in 2007 and the Commission's recent recommendation. A draft ordinance is attached to this memorandum.

ANALYSIS

The payment of salary or compensation by an employer to an employee as a reportable contribution or expenditure is addressed by regulations of the Fair Political Practices Commission (FPPC). In order to determine whether the City can limit established exceptions to the payment of compensation as contributions or expenditures under state law, it is necessary to review the applicability of FPPC law to the City's Ordinance and any Constitutional issues raised by the limitations.

A. Fair Political Practice Commission (FPPC) Regulations

FPPC regulations provide that the payment of salary, the reimbursement for personal expenses, or other compensation by an employer to an employee who spends more than 10 % of his or her compensated time in a calendar month performing services for political purposes is a contribution or an expenditure of the employer if:

1. The employee renders services at the request or direction of the employer; or
2. The employee, with the consent of the employer, is relieved of any normal working responsibilities related to his or her employment in order to render the personal services, unless the "employee engages in political activity on bona fide, although compensable, vacation time or pursuant to a uniform policy allowing employees to engage in political activity." (2 Cal. Adm. Code Section 18423).

Under the Political Reform Act (PRA), an employer makes a contribution or expenditure if, at the request or direction of the employer, an employee spends more than 10% of his or her time in any one month performing services for a political purpose. An employer also makes a contribution or expenditure if the employer consents to relieving the employee of normal working responsibilities for more than 10% of the employee's compensated time to render personal services for a political purpose. However, this second definition of a contribution or expenditure does not apply if the employee

engages in political activity on vacation time or "pursuant to a uniform policy allowing employees to engage in political activity."

The FPPC has informed our office in the past that "uniform policy" exception is intended to apply when an employer establishes a uniform policy that permits employees to spend some amount of compensable time engaged in political activities of their own choosing. Thus, if the employer limits or directs the political activities of an employee on vacation or pursuant to a uniform policy, this exception would not apply; the activities of the employee would be a contribution charged to the employer.

B. Applicability of PRA to Existing City Campaign Ordinance

The San Jose Municipal Code provides that the words and phrases in Title 12 (Ethics Ordinances) have the same meanings and are interpreted in the same manner as those terms are interpreted under the state Political Reform Act unless otherwise specified. (SJMC Section 12.02.020.) Additionally, definitions in the City's Campaign Ordinance are interpreted in accordance with the applicable definitions and provisions of the Political Reform Act and the FPPC regulations. (SJMC § 12.06.010.)

The City's Campaign Ordinance also provides that contributions by business entities are limited in accordance with the PRA. (SJMC § 12.06.250.) A business entity is defined as any organization or enterprise operated for profit, including but not limited to a proprietorship, partnership, firm, business trust, joint venture, syndicate, corporation or association. (SJMC § 12.06.020.)

In light of these provisions, the criteria set forth in California Administrative Code §18423 establish when the political services of an employee constitute a contribution on the part of an employer under the City's Campaign Ordinance. Candidates and campaign committees who receive the services of compensated employees as set forth in § 18423 are required to report them as campaign contributions, and those contributions or expenditures are subject to the City's campaign limits. (SJMC § 12.06.910.)

Given the interplay of the relevant provisions of the PRA, FPPC Regulations, and the City Campaign Ordinance, the loophole issues raised by the Council referral to the Commission are addressed by the PRA and FPPC Regulations. Under § 18423, where an employer directs or requests an employee to spend compensated time rendering services for political purposes, it is a contribution or expenditure of the employer if the employee spends more than 10% of his or her compensated time in any month engaged in such services. The exception for a uniform policy does not apply where an employee is acting at the direction or request of his or her employer. The uniform policy exception applies only when the employer consents to the employee being relieved of normal business activities pursuant to an established policy that permits employees to engage in political activities of their own choosing.

C. The Proposed Amendment to the Municipal Code

The proposed amendment to the Municipal Code as recommended by the Elections Commission would provide that the definition of "Contribution" in the Code include the payment of salary, or other compensation by an employer to an employee who spends any of his or her compensated time rendering services for political purposes related to a City candidate.

The proposed ordinance would require that all compensable political activity must be reported, even that which constitutes less than 10% of an employee's compensated time in a calendar month. The proposed ordinance does not change the PRA provisions that apply to political activity undertaken by an employee during vacation or undertaken pursuant to a uniform policy allowing employees to engage in political activity of their own choosing.

D. The Political Reform Act & Preemption Issues

The PRA does not prevent a local agency from imposing additional requirements provided the requirements do not prevent a person from complying with the Act. (§ 81013.) This section establishes "the authority of local agencies to impose obligations beyond those set forth in the Act and makes clear that the Act is not intended to so occupy the field it regulates that state and local government agencies are powerless to enact additional requirements." (CA FPPC Op. 0-01-112.) If an additional requirement prevents a person from complying with the Act, however, the provisions of the PRA prevail. (§ 81013.)

Permitting local agencies to impose additional restrictions not in conflict with the PRA reflects the general principle that the conduct of municipal elections, the manner and method by which municipal officers are elected, and the regulation of persons attempting to influence the outcome of a local election all fall within the parameters of a municipal affair. (Cal.Const., art. XI, Section 5. Johnson v. Bradley (1992) 4 Cal. 4th 389.)

The exception eliminated by the proposed ordinance may be viewed as additional requirements or obligations imposed beyond those set forth in the Act, as specifically permitted by under Government Code § 81013.

E. Constitutional Concerns

The municipal affairs of a charter city, however, are subject to the various guarantees of the state and federal constitutions. (88 Ops. Cal. Atty. Gen. 71; see Johnson v. Bradley (1992) 4 Cal 4th 389, 403 fn. 15.) The First Amendment, which affords the broadest protection to political expression (Buckley v. Valeo (1976) 424 U.S. 1), generally applies

to for-profit corporations. (*PG&E v. City of Berkeley* (1986) 60 Cal.App.3d 123.) In *Buckley*, the Court noted that federal legislation governing contribution and expenditure limitations "operate in an area of the most fundamental First Amendment activities," and held that to protect the First Amendment right of association in the context of campaign contribution limits, a government must "demonstrate a sufficiently important interest and employ means closely drawn to avoid unnecessary abridgment of associational freedoms." (See 85 Ops. Cal. Atty. Gen. 43.)

Requiring the reporting of all compensated employee time spent on political activities at the direction, request, or with the consent of the employer would not appear to implicate constitutional concerns. Thus, the City could eliminate the requirement that only those activities over 10 % need to be reported as contributions or expenditures as provided in the proposed ordinance. Although at some point the record keeping requirements for *de minimis* political activities may prove burdensome, this would not raise a constitutional issue.

However, eliminating the exception for political activities engaged in on an employee's vacation time or pursuant to a uniform policy would, in our opinion, be problematic for the following reasons. If an employee chooses to use vacation time to perform political activities, presumably those activities would be of the employees own choosing and not at the direction of the employer. The FPPC has indicated its belief that "uniform policy" exception applies to a policy that permits an employ to engage in political activity of the employee's choosing. Thus, with regard to these two exceptions, the employee is compensated for political activity engaged in without a request, direction, or with the consent of the employer.

Additionally, the First Amendment rights of association and speech of either the employer or employee might be violated by requiring an employer to report as a contribution or expenditure compensation paid to an employee for political activities when the employer has not directed, requested, or consented to those political activities. A court would be required to use strict scrutiny to determine whether the ordinance is narrowly tailored to avoid any real and appreciable impact on the exercise of these fundamental rights.

Additional factors should be considered in any analysis. For example, the net effect of eliminating the exception regarding vacation time and a uniform policy discourages employers from developing or continuing uniform policies permitting political activities, as well as discourages employees from participating in such programs or engaging in political activities while on vacation.

Finally, elimination of the vacation or uniform policy exception may implicate the privacy, speech, or association rights of an employee who, in order for the employer to satisfy the contribution and expenditure ordinances, is required to report to his or her employer

political activities the employee engaged in during the employee's vacation or pursuant to a uniform employer policy. See. CA FPPC Op. 79-002 (1979).

CONCLUSION

The Political Reform Act specifically permits local agencies to have additional requirements than those set forth in state law. As the conduct of a municipal election is a municipal affair, the City could require by the proposed ordinance, that for local elections, all employee activities, even those that constituted less than 10% of an employee's compensated time in any one month, must be reported as a contribution by the employer.

Municipal affairs are, however, subject to constitutional constraints. Thus, a requirement that an employer must report as a campaign contribution employee political activities that occur during an employee's paid vacation or pursuant to a uniform policy of the employer allowing for time off for political activity of the employee's own choosing may implicate constitutionally guaranteed speech, associational, and privacy rights of either the employer or the employee.

PUBLIC OUTREACH/INTEREST

This memorandum is posted on the City's website for the March 25, 2008 Agenda.

RICHARD DOYLE
City Attorney

By 
Norman Sato
Chief Deputy City Attorney

Attachment

cc: Elections Commission
Lee Price

For questions please contact NORM SATO, Chief Deputy City Attorney at
(408) 535-1925